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APPLICABILITY OF CERTAIN U.S. LAWS THAT PERTAIN TO U.S. MILITAR--ETC(U)
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BY THE COMPTROLLER GENERAL

Report To Senator Edward Zorinsky

OF THE UNITED STATES

Applicability Of Certain U.S. Laws That Pertain To U.S. Military Involvement In El Salvador

Section 21(c)(2) of the Arms Export Control Act requires the President to submit a report to the Congress within 48 hours of the existence or a change in status of *significant hostilities or terrorist* acts which may endanger American lives or property. Despite U.S. Government property losses, the possible endangering of U.S. personnel, and the use of substantial emergency funds by the President in response to the Ilopango air base raid, no report was filed. GAO believes a report should have been filed.

DOD determined that the deployment of mobile training teams to El Salvador in 1981 did not require a report to the Congress under the War Powers Resolution. This determination was based on certain representations. The facts GAO developed contradict some of these representations.

UNITED STATES GENERAL ACCOUNTING OFFICE

GAO/ID-82-53
JULY 27, 1982

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-207901

The Honorable Edward Zorinsky
United States Senate

Subject: Applicability Of Certain U.S. Laws That Pertain To U.S. Military Involvement In El Salvador (GAO/ID-82-53)

Dear Senator Zorinsky:

In response to your request of March 24, 1982, we examined various aspects of the impact of increasing military aid to and U.S. involvement in El Salvador. This letter reports the facts relevant to the applicability of certain sections of the Arms Export Control Act and the War Powers Resolution as they relate to the security assistance program in El Salvador and also the facts pertinent to the application of a section of the Uniformed Services Pay Act of 1963 as it relates to the payment of hostile fire pay (HFP).

HOSTILE FIRE PAY

Under DOD regulations issued pursuant to section 9 of the Uniformed Services Pay Act of 1963, military personnel are entitled to HFP of $65 a month per person for those months in which they participated in a hostile encounter, in the case of land forces, or were in its immediate vicinity and were placed in danger of being wounded, injured, or killed. The regulations also provide for a hostile fire area designation by which all military personnel are paid HFP for being in the designated area.

A request to designate El Salvador as a hostile fire area was approved in early 1981 and then reversed to avoid the impression that the United States had combat forces in El Salvador. However, we found that HFP has been paid to most of the U.S. Army personnel in El Salvador on an individual monthly certified basis. The overall extent and continuous nature of these payments indicates that DOD virtually treats El Salvador as a hostile fire area.

FAILURE TO FILE SECTION 21(c)(2)REPORT

Section 21(c)(2) of the Arms Export Control Act, requires the President to submit a report within 48 hours of the existence or a change in status of significant hostilities or terrorist acts

which may endanger American lives or property. One reason, and apparently the major reason, why DOD officials reversed the decision to designate El Salvador as a hostile fire area was to preclude giving the impression of triggering the requirements of section 21(c).

More important, with respect to section 21(c)(2) compliance, was the guerrilla's January 27, 1982, raid on Ilopango, the main Salvadoran air force base located on the outskirts of the capital. Among the aircraft destroyed or damaged were four U.S. Army helicopters leased to the Salvadoran Government. Additionally, there were U.S. trainers deployed to the base. In response to these hostilities, the President ordered the largest use of emergency funds ever authorized under section 506(a) of the Foreign Assistance Act of 1961, as amended, almost twice the total of the amounts previously authorized pursuant to this section. Despite these property losses and the possible endangering of U.S. personnel, and despite the historically unparalleled use of emergency funds, no report was filed. We believe that a report should have been filed.

THE WAR POWERS RESOLUTION

The DOD determination that the War Powers Resolution did not require a report to Congress concerning deployment to El Salvador in 1981 of U.S. mobile training teams was based in part on a representation that military personnel in El Salvador would not receive HFP. It was based in part also on a representation that such personnel were not expected to be exposed to areas of military operations. The facts we developed contradict those representations.

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The data was developed from records of the Departments of State, Defense and the military services, and from information provided by officials of these agencies. Due to differences in the methods of recording HFP and the timing of HFP claims and payments, we were unable to verify HFP payments for all military people assigned to El Salvador. Instead, we selected and verified HFP payments for three periods we believe to be representative of and pertinent to the overall payment situation. As requested by your office, we did not obtain comments from the Departments of Defense and State on the contents of this report. This review was performed in accordance with our current "Standards for Audit of Governmental Organizations, Programs, Activities, and Functions."

Unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies to the Chairmen, Senate Foreign Relations Committee, House Foreign Affairs Committee, House and Senate Committees on Appropriations, House Committee on Government Operations, Senate Committee on Governmental Affairs; the Director, Office of Management and Budget; the Secretaries of State and Defense; the Director, Defense Security Assistance Agency; and other interested parties.

If we can be of further assistance in this matter, please let us know.

Sincerely yours,

Charles A. Bowsher

Comptroller General
of the United States

Contents

ABBREVIATIONS

AECA	Arms Export Control Act
CY	Calendar Year
DOD	Department of Defense
DODPM	DOD Military Pay and Allowances Entitlements Manual
DSAA	Defense Security Assistance Agency
HFP	Hostile Fire Pay
MIA	Missing in Action
MILGROUP	U.S. Military Group El Salvador
MTT	Mobile Training Team

APPLICABILITY OF CERTAIN U.S. LAWS THAT PERTAIN TO U.S. MILITARY INVOLVEMENT IN EL SALVADOR

After a lapse of several years, the United States resumed military training for El Salvador in 1980 and arms transfers to that country on January 16, 1981, stating that this was done to enable El Salvador to counter a Communist-armed guerrilla offensive. Subsequently, military aid to El Salvador soared to at least $81 million in fiscal year 1982.

As the war between Salvadoran government and guerrilla forces has escalated, questions have arisen concerning the applicability of several U.S. laws to U.S. involvement in El Salvador. Specifically, we reviewed the deployment of U.S. military personnel in, and the providing of military equipment, training, and services to El Salvador with reference to section 21(c) of the Arms Export Control Act (AECA) and the War Powers Resolution. We also looked at section 9 of the Uniformed Services Pay Act of 1963, relating to hostile fire pay (HFP) and its implementing regulations.

REQUEST TO DESIGNATE EL SALVADOR AS A HOSTILE FIRE AREA

On August 6, 1980, the Commander of the U.S. Military Group El Salvador (MILGROUP) formally requested that El Salvador be designated a hostile fire area and that this designation be made retroactive.

At the time of the request, HFP was authorized in El Salvador only on an individual basis for each month in which a military member was certified to have been subject to hostile action. The request was to permit payment of HFP to all military personnel present for duty in El Salvador, without the need for individual certifications that each military member had been exposed to hostilities.

Referring to the "climate and hostilities existing in this country," the proposed designation of El Salvador as a hostile fire area was based on a number of violent incidents against U.S. military personnel and Embassy property which had occurred in El Salvador and especially in the capital of San Salvador during the previous year. Senior Air Force and Marine Corps/Navy section representatives and the Defense Attache concurred in the request.

Legal basis for HFP

Statutory authority for HFP is derived from 37 U.S.C. §310 (1976), which was added by section 9 of the Uniformed Services Pay Act of 1963, approved October 2, 1963, Public Law 88-132, 77 Stat. 210, 216. That section, as amended, provides that except

in time of war declared by the Congress, a military member may be paid an additional $65 a month for any month in which he

> "(1) was subject to hostile fire or explosion of hostile mines;
>
> (2) was on duty in an area in which he was in imminent danger of being exposed to hostile fire or explosion of hostile mines and in which, during the period he was on duty in that area, other members of the uniformed services were subject to hostile fire or explosion of hostile mines; or
>
> (3) was killed, injured, or wounded by hostile fire, explosion of a hostile mine, or any other hostile action."

Unlike the Korean War, in which there was a clearly distinguishable line of demarcation between friendly and enemy forces, the Vietnam War presented a possibility of exposure to hostile fire in almost any area or location in Vietnam. This provision was enacted in recognition that U.S. armed forces in Vietnam or elsewhere should be entitled to special pay when exposed to possible hostile activity, even if not actively engaged in combat (B-168403, Mar. 3, 1975). Under Department of Defense (DOD) regulations, Vietnam, Cambodia, and Iran are designated hostile fire areas.

The DOD Military Pay and Allowances Entitlements Manual (DODPM) at Part I, Chapter 10, table 1-10-1, provides that any military member assigned to a designated hostile fire area may receive HFP for each month he is present in that area, without regard to his personal exposure to hostile fire. In contrast, a military member in a country or region not designated a hostile fire area may receive HFP only for those months in which he participated in a hostile encounter while on duty or on board the same vessel or aircraft which was the subject of hostile fire, or in the case of land forces, was assigned to the same military unit and was performing duty with the unit at the time of the hostile action. The regulations state:

> "In case of land forces, only those of the unit (patrol, squad, platoon or larger unit) which are in the immediate vicinity of the trajectory or point of impact or explosion of hostile ordnance and are placed in danger of being wounded, injured, or killed from such causes are entitled to payment."

The above provision, although restrictive, actually considerably broadened the language which had preceded it. DOD Directive 1340.6 had provided at one time that HFP, outside the areas designated, could not be paid to any military member who, although fired at, was not hit.

On June 8, 1967, the USS Liberty was attacked by Israeli forces and sustained over 800 hits from hostile fire and one torpedo explosion. The attack left 34 dead and 170 injured out of a total crew of 296. DOD determined that, since the hostile action took place outside of Vietnam (the only hostile fire area then designated), HFP could be paid only to those military personnel who were killed, wounded, or injured.

In response to internal and congressional pressures to broaden the directive, DOD's Office of General Counsel was asked whether the directive could be modified to extend entitlement, outside of designated areas, to the following situations:

"1. To all members of a group, such as an infantry squad, when only one member may be killed or wounded by hostile fire. (Example: Korea outside presently designated area.)

"2. To all members of a ship, when only one may be killed or wounded by hostile fire. (Example: USS Pueblo.)

"3. To all military occupants of an airplane when only one may be wounded or killed by hostile fire.

"4. In case 1, 2, and 3 above when a hostile act occurs (fired-at, mine explosion, etc.) but no one is wounded or killed."

In May 1968, DOD's Office of General Counsel concluded that the directive could be modified as proposed. On June 20, 1969, the DODPM--into which directive 1340.6 had been incorporated--was revised to be substantially similar to present regulations. The revision was retroactive to August 1, 1968.

The regulations also permit that certain geographical areas be designated hostile fire areas. At the present time, Vietnam, Cambodia, and Iran are so designated. Within a designated area, every military member assigned permanently or for more than 6 days in any month is entitled to receive HFP for that month regardless of whether or not that member was actually exposed to hostile action. In designating a country or region as a hostile fire area, the Secretary of Defense or his designee must determine, in accordance with 37 U.S.C. §310(a), that all military personnel present

in the area are subject to hostile fire or are in imminent danger of being so exposed.

Initial approval of the request

The request to designate El Salvador a hostile fire area was forwarded to the U.S. Southern Command in Panama and the 193rd Infantry Brigade in Panama. Each concurred in the request (August 26, 1980, and September 11, 1980, respectively) which was then forwarded to the Army Personnel Center. On October 24, 1980, the Acting Assistant Secretary of the Army for Manpower and Reserve Affairs recommended to the Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics) that El Salvador be designated a hostile fire area. In justifying the request, he said that the Army had reviewed and verified the situation depicted in the MILGROUP Commander's letter. "In view of the intensity of the hostilities and the fact that all military members in El Salvador are potentially subject to the hazardous conditions there," the Army believed that approval of MILGROUP Commander's request was warranted.

In a January 16, 1981, memorandum, the Deputy Assistant Secretary for Military Personnel Policy advised his service counterparts that a review of recent past and current circumstances indicated designating El Salvador as a hostile fire area was warranted. Accordingly, he designated it as such, effective October 1, 1979, the month in which two Marine Corps guards were shot at and wounded during a mob attack on the U.S. Embassy in San Salvador. Military Personnel Policy officials said the designation was made solely for administrative reasons, simplifying payment of HFP, and the policy aspects of the decision were never considered.

Reversal of the decision

While El Salvador had been designated by memorandum to be a hostile fire area, payment could not take place until the DODPM and the respective service implementing regulations were amended to reflect this change. In coordinating the implementation of this change, Assistant Secretary of Defense for International Security Affairs (ISA) officials objected for policy reasons to the designation of El Salvador as a hostile fire area.

ISA officials requested that the designation be withheld. Noting that section 21(c) of the AECA (22 U.S.C. §2761(c)) prohibited U.S. personnel performing defense services sold under the AECA from engaging in "any duties of a combatant nature" and, further, required congressional notification "within 48 hours after the outbreak of significant hostilities involving a country in which United States personnel are performing defense services," ISA wished to preclude giving the impression that the United States had combat forces stationed in El Salvador. The applicability of section 21(c)(2) to the proposed designation of El Salvador as a hostile fire area will be discussed later.

As a result of the ISA objection and the circumstances surrounding it, the Deputy Assistant Secretary on April 20, 1981, reversed his decision stating:

> "During the process of implementing this designation for special pay purposes, we were made aware of other considerations that mitigated against this action. Accordingly, the Department of Defense Pay and Allowances Entitlements Manual (DODOP) will not be revised to reflect El Salvador as a Hostile Fire Area * * *."
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> * * * * *
>
> "All concerned should be reminded that special pay for duty subject to hostile fire may continue to be paid in accordance with the administrative regulations of the respective Services, under the conditions prescribed in the DODPM * * *."

HFP for El Salvador

Although El Salvador has not been designated a hostile fire area, the Army has, by the level and extent of HFP payments authorized, acted as if it virtually were. Based on our review of various pay records, it appears that most military personnel in El Salvador were receiving HFP most of the time.

For calendar years (CY) 1980 and 1981, HFP statistics worldwide and for El Salvador were as follows.

CY 1980

Service	World wide amounts		El Salvador amounts	
	People a/	Dollars	People a/	Dollars
Army	29	6,173	11	2,665
Air Force	20 b/	12,537	0	0
Navy	6 c/	4,225	0	0
Marines	23	5,200	* d/	* d/
TOTAL	78	28,135	11+	2,665+

a/Received HFP for one or more months during the year.

b/All for missing in action in Southeast Asia (MIA).

c/Three are MIAs and three are Iran related.

d/Specific HFP data not available.

CY 1981

Service	World wide amounts People a/	Dollars	El Salvador Amounts People a/	Dollars
Army	129 b/	37,099	115	28,454
Air Force	11	7,410	0	0
Navy	4	975	0	0
Marines	23	3,055	6	* c/
TOTAL	167	48,539	121	28,454+

a/Received HFP for one or more months.

b/Nine are Iran related and include back pay.

c/Specific HFP data not available.

Not only are the majority of HFP payments being made for El Salvador and particularly, for Army-related claims in El Salvador, but they generally are for continuous periods of time (the length of time of service in El Salvador), rather than for isolated months corresponding to specific incidents.

For example, our review of the four Army personnel assigned to the MILGROUP as of March 1982 showed that, as a group, they collected HFP for 60 percent of their total time spent in El Salvador. This statistic would be 100 percent except for one member of the MILGROUP as shown below.

Individual	Month arrived in El Salvador	Months paid HFP	Months in El Salvador	Months paid HFP to months in El Salvador
#1	January 1982	3	3	100%
#2	August 1981 a/	7	7	100%
#3	June 1981	1	9	11%
#4	March 1982	1	1	100%

a/Was not in El Salvador sufficient time to qualify for HFP for August 1981.

We also reviewed the records 1/ of 38 Army personnel on temporary assignments to El Salvador during the second half of calendar year 1981. For this period, we found that HFP was paid for 97 of the 123 total person months 2/ during which personnel could have been eligible to receive the pay, or 79 percent. Furthermore, 22 of the 38 individuals or 58 percent received HFP for every month they were in El Salvador. In another six cases, or 16 percent, the individuals received HFP the majority of their time in El Salvador. None of the 10 remaining individuals, or 26 percent, received HFP.

Typically, each Army member submits and has approved a certification of entitlement to HFP for each month that member is in country. Such a certification follows:

STATEMENT

I certify that while assigned to the USMILGP San Salvador, El Salvador, under Orders_____, dated,_____, I was subjected to hostile fire as defined in Rule 5, DLT 1-10-1, DODPM, during the month of _____ 1982.

(Signature, name, rank, and serial number of military member)

APPROVAL

The above named individual has met the criteria for Hostile Fire Pay during the month of _____ 1982, when he was subjected to small arms fire or he was close enough to the trajectory, point of impact of explosion of hostile ordance so that he was in danger of being wounded, injured or killed.

(Signature, name, and rank of approving officer)

1/Records where complete data was available.

2/For purposes of our analysis, a person month is one person in El Salvador for sufficient time to be eligible to qualify on a time basis for HFP for that month. For example, a two person team in El Salvador from mid-January to mid-May would be ten person months. If they received eight months of HFP between them, regardless of the sequence of months in which they earned the HFP, they would have received HFP 80 percent of the total person months.

No mention of any specific incident of exposure to hostile fire appears on the certification document, nor is any additional written support provided to either the officer approving the claim for HFP or the finance officer who certifies payment.

Our data on Air Force and Navy HFP is incomplete at this time. However, given the very small number of people involved compared to the Army and the preliminary results of what data we do have, we do not believe that the exclusion of this data significantly alters the results of our analysis.

DOD regulations, it may be recalled, require that hostile fire pay in non-designated areas be paid only to those land-based personnel who are assigned to a military unit subject to hostile fire and who are in the immediate vicinity of the hostile fire and are thus placed in danger of being wounded, injured, or killed. The entitlement determination must be made for each month in which a military member claims HFP. Thus, a member receiving HFP for 10 continuous months must have been subject, at least once each month, to a violent incident in which he either was fired upon or was in such immediate vicinity of the hostile fire that he was in danger of being hit. However, no mention of any specific incident of hostile action appears on the monthly certification documents, nor are we aware that any additional support was provided to the officer approving payment of HFP.

The certifications attest to most U.S. personnel receiving HFP for continuous periods of time corresponding to their entire length of time in-country for hostile incidents against them; otherwise the personnel would be receiving HFP in contravention of DOD's regulations. Therefore military personnel (generally Army) are being paid HFP virtually as if El Salvador were a designated hostile fire area.

DOD has not made a determination that all military personnel in El Salvador, wherever located, are in imminent danger of being hit by hostile fire. It is that determination, required if DOD were to decide to declare El Salvador a hostile fire area, that ISA officials feared might give the impression of triggering section 21(c) of the AECA.

SECTION 21(c) OF THE AECA

Prior to December 1980, section 21(c) of the AECA prohibited personnel performing defense services sold under the Act from performing "any duties of a combatant nature, including any duties related to training, advising, or otherwise providing assistance regarding combat activities" abroad.

The Carter administration sought to delete the phrase concerning training or advising, arguing that should there be an attack against a friendly country where U.S. defense services were being provided, these personnel would have to stop their activities "thus leaving the U.S. ally without any U.S.-provided

training, or other defense support." The Senate Foreign Relations Committee report (S. Rep. No. 96-732 at 20 (1980)) rejected that proposal as "creating too broad an opportunity for the possible accidental involvement of United States personnel in combat." Instead, the Committee drafted legislation which prohibited those training, advising, or other security assistance functions that may engage U.S. military personnel in combat.

The conference committee report (H.R. Rep. No. 96-1471 (1980)), published the following to serve as a guideline in determing activities permitted and prohibited under section 21(c):

Activities permitted

Continue to help organize and train ground force units, including training for combat, in support areas.

Continue to help organize and train air force units, including training for combat; continue to help repair and maintain combat equipment; assist in operation and maintenance of airfield facilities, such as hydrant refueling systems and munitions storage and repair facilities.

Continue to help organize and operate vehicle repair and maintenance activities in support areas.

Continue to help train personnel in use of highly technical equipment in support areas.

Continue to provide advice on military strategy and doctrine at headquarters above unit level.

Activities barred

No trainers, advisers, or other personnel with units engaged in combat.

No flight line activities with combat units, such as arming or fueling aircraft for combat sorties.

No personnel with or delivering equipment to units engaged in combat.

No personnel with units engaged in combat.

In addition, the Senate Foreign Relations Committee, noting that it initially would be up to the President to decide which duties "may" engage U.S. personnel in combat, added a reporting requirement so that the Congress might share in that decision. Designated section 21(c)(2) and enacted by section 102 of the International Security and Development Cooperation Act of 1980 (Public Law 96-533, Dec. 16, 1980, 94 Stat. 3132), the provision stated:

> "(2) Within 48 hours after the outbreak of significant hostilities involving a country in which United States personnel are performing defense services pursuant to this Act or the Foreign Assistance Act of 1961, the President shall transmit to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth --
>
> "(A) the identity of such country and a description of such hostilities; and
>
> "(B) the number of members of the United States Armed Forces and the number of United States civilian personnel performing defense services related to such hostilities in such country, their location, the precise nature of their activities, and the likelihood of their becoming engaged in or endangered by hostilities."

About one month after this provision was enacted into law, President Carter determined under section 506(a) 1/ of the Foreign Assistance Act that immediate assistance to El Salvador in the amount of $5 million was needed because of an unforeseen emergency. That emergency was the so-called "final offensive" by Farabundi Marti Liberation Front guerrilla forces against the El Salvadoran Government. U.S. civilian and military personnel were present in El Salvador at the time and some defense services were being performed. Nevertheless, President Carter failed to send a report to the Congress. In a legal memorandum prepared by DOD's Office of General Counsel in February 1981, it was conceded that the President did not comply with section 21(c)(2):

1/Section 506(a) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. §2318(a)), allows the President under certain conditions to provide defense articles, services, and training from the stocks of the Defense Department.

"The language of that determination together with its justification--widespread guerrilla attacks which were depleting the military resources of El Salvador suggested a situation in which a report would be required. A report was not filed, but that precedent should be considered oversight rather than standard setting."

Four days after President Carter's section 506(a) determination, President Reagan was inaugurated. The Reagan administration's position was that it was not required to submit a report to the Congress with respect to section 21(c)(2) since the "outbreak of significant hostilities" and the 48-hour period thereafter did not occur during its administration. Moreover, the administration reasoned that a mere continuation of hostilities would not trigger the section 21(c)(2) reporting requirement since that would not constitute an "outbreak" of hostilities.

At Senate Foreign Relations Committee hearings held in May 1981, Senator Glenn stated the following in proposing to amend section 21(c)(2)

"It seems preposterous to me that the administration did not make this report, especially when the casualty rate is somewhere over 70 a day, when in the last year there were over 12,000 people killed, when 4 American churchwomen were killed there, when our Embassy was shot up 5 times in 4 weeks, when our very reason for being there is to train people for a combat role to help control the situation in their own country. Yet, at the same time the administration maintains that this does not need to be reported to the Senate under current law."

* * * * *

"I feel both this administration and the last failed in their obligation to live up to the law to report the El Salvador situation. Congress certainly did intend that such situations be reported and that we be notified when there is a change in status in these countries. As a result of this, we must now lower the threshold for triggering a report."

The so-called Glenn Amendment, enacted as section 103 of the International Security and Development Cooperation Act of 1981 (Pub. L. No. 97-113, Dec. 29, 1981, 95 Stat. 1519, 1521), amended section 21(c)(2) as follows:

"(2) Within forty-eight hours of the existence of, or a change in status of significant hostilities or terrorist acts or a series of such acts, which may endanger American lives or property, involving a country in which United States personnel are performing defense services pursuant to this Act or the Foreign Assistance Act of 1961, the President shall submit to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, classified if necessary, setting forth--

"(A) the identity of such country;

"(B) a description of such hostilities or terrorist acts; and

"(C) the number of members of the United States Armed Forces and the number of United States civilian personnel that may be endangered by such hostilities or terrorist acts."

Thus, a report must be submitted within 48 hours of the existence of or a change in status of significant hostilities or terrorist acts which may endanger American lives or property. The law does not define what hostilities or terrorist acts are "significant."

The Reagan administration has never filed a report pursuant to section 21(c)(2) of of the AECA. In fact, from December 1980 to March 1982, DOD had no implementing regulation for complying with section 21(c)(2) reporting requirements. On March 18, 1982, DOD issued internal procedures pertaining to implementation of that reporting requirement. Those procedures provide that a report is required only if the hostilities or terrorist acts are "of a meaningful nature" and "constitute a general threat to American lives or property."

Implication of a hostile fire area designation

It may be recalled that one reason stated by DOD officials in not designating El Salvador a hostile fire area was that to have done so might have given the impression of triggering the requirements of section 21(c). Such a designation would have required a determination that all military personnel in El Salvador either are subject to hostile fire or are in imminent danger of being so exposed. Section 21(c)(1) prohibits U.S. military personnel performing defense services from engaging in any "combatant duties" and section 21(c)(2), as it then read, required a report

to the Congress within 48 hours of the outbreak of significant hostilities in countries in which U.S. personnel are performing defense services.

Declaring that all U.S. military personnel assigned to an entire country are in imminent danger of being shot at suggests that significant hostilities exist in that country, so as to trigger the necessity for a report to the Congress under section 21(c)(2). It also suggests that some U.S. personnel could be drawn into situations which may engage them in combat activities, an event prohibited by section 21(c)(1).

Ilopango air base raid

On January 27, 1982, Salvadoran guerrillas attacked the Salvadoran air base at Ilopango on the outskirts of the capital of San Salvador. The guerrillas destroyed or damaged a significant part of the Salvadoran Air Force, including six of the 14 UH-1H helicopters. All three helicopters destroyed in the attack were owned by the U.S. Army and were being leased to El Salvador. In addition, one of the helicopters which was damaged and returned to the United States for repairs was a leased U.S. Army helicopter. Further, there were two teams of U.S. trainers deployed to the Ilopango air base at the time of the guerrilla raid. They were performing helicopter pilot and maintenance training, and at least some were receiving HFP on a continuous basis.

On February 2, 1982, President Reagan authorized an additional $55 million in emergency section 506(a) funds for El Salvador, the largest section 506(a) determination ever made and almost twice the total of the amounts previously authorized pursuant to this section. This was justified by State Department officials in testimony before the Senate Foreign Relations and House Appropriations Committees as necessary to replace the aircraft and helicopters lost in the raid to save El Salvador from a "probable victory" by leftist guerrillas. Part of the funds (approximately $750,000 per helicopter) were used to enable El Salvador to buy the U.S. owned helicopters including those which had been destroyed or damaged in the guerrilla attack. Further, $265,000 of these funds were required to repair the damaged helicopter.

Whether the reporting requirement of section 21(c)(2) is applicable to any given set of facts depends on whether those facts establish the occurrence of "significant hostilities or terrorist acts" within the meaning of that phrase as used in the AECA. Neither section 21(c)(2) nor its legislative history provides a definition of this phrase or guidance as to the extent of hostile activity that must occur to trigger its requirement. Thus, the determination is ultimately a matter of judgment to be applied on a case by case basis. In this case, a guerrilla raid on El Salvador's principal air base occurred when U.S. personnel were deployed to the air base. Among the aircraft destroyed or damaged in the raid were nearly half of the helicopters used by the Salvadoran Air Force, two-thirds of which were owned by the U.S. Government. In our judgment, this represents "significant hostilities

or terrorist acts" endangering "American lives or property" and should have been reported to the Congress under section 21(c)(2). 1/

Interestingly, a similar question was raised during Senate hearings in 1981 on the situation in El Salvador:

SENATOR "CRANSTON. In your judgment would a guerrilla attack upon U.S. military personnel or the locations where they are stationed bring into play the reporting requirements for the War Powers Resolution."

GENERAL "GRAVES. 2/ I think it would not be the War Powers Resolution, Senator Cranston. But as Mr. Carlucci said in his recent letter to the chairman, if we had an outbreak of significant hostilities, we would report in compliance with section 21(c) of the Arms Export Control Act." Hearings on the Situation in El Salvador Before the Senate Comm. on Foreign Relations, 97th Cong., 1st Sess. 52 (1981).

When asked why a report was not provided in connection with the Ilopango raid, a DSAA official stated that DSAA (which would have initiated such a report) was not provided any information on which to form a judgment on whether or not a section 21(c)(2) report was required. Thus, he maintained that DSAA had no knowledge that U.S. lives and property were endangered in El Salvador, and consequently no report was required.

WAR POWERS RESOLUTION

After numerous attempts and over a Presidential veto, the Congress on November 7, 1973, passed the War Powers Resolution (50 U.S.C. §§1541-48) to govern the use of U.S. armed forces abroad in the absence of congressional authorization or a declaration of war. Among other objectives, the Resolution was intended

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1/The Senate report on the Glenn amendment (S. Rep. No. 97-83 at 27 (1981)) contains a sentence that states: "The report would be required only if those U.S. personnel performing defense services might be endangered by the hostilities or terrorist acts." Whatever significance is attibutable to the omission in the sentence of any reference to the loss of property, we have concluded from our study of the facts that the hostilities at Ilopango included a clear potential for endangerment of U.S. personnel. As noted earlier, DOD procedures call for a report if hostilities "constitute a general threat to American lives or property."

2/At the time, General Graves was Director of the Defense Security Assistance Agency (DSAA).

to avoid escalating executive branch commitments of U.S. military personnel into foreign conflicts without the "collective judgment" of the Congress.

In general terms, the resolution requires the President to notify, consult, and participate with the Congress in the decision of whether or not the United States should go to war or should deploy its forces in a manner that war is likely.

Section 3 of the Resolution requires the President "in every possible instance" to consult with the Congress before introducing U.S. armed forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated.

The President is directed by section 4 of the resolution to submit a report to the Congress within 48 hours after U.S. forces have been introduced

--into hostilities or into situations where imminent involvement in hostilities is indicated clearly by the circumstances;

--into a foreign nation's territory, airspace, or waters, while equipped for combat (except for deployments related solely to training, supply, repair); or

--in numbers substantially enlarging the number of U.S. Armed Forces equipped for combat already located in a foreign nation.

The report must set out the circumstances which required the U.S. action, its constitutional and legislative authority, and its estimated scope and duration.

If, within 60 days thereafter, the Congress fails to authorize the presence of U.S. troops in that nation or to extend its period for acting on the President's report, the President must terminate such use of U.S. troops. The only exception is where an armed attack on the United States prevents the Congress from meeting. In addition, by passing a concurrent resolution, the Congress may direct at any time the removal of U.S. forces engaged abroad in hostilities without a declaration of war or specific statutory authority.

Key terms of the Resolution

Thus, the War Powers Resolution is triggered when U.S. armed forces are (or are about to be) "introduced" into "hostilities" or "imminent involvement in hostilities," or they enter a foreign nation "while equipped for combat" or in numbers "substantially enlarging" the number of U.S. troops "equipped for combat." What do these phrases mean?

Introduction of United States Armed Forces

Of several key phrases in the War Powers Resolution, only one--"introduction of United States Armed Forces"--has been partially defined within the resolution itself. Section 8(c) provides that the phrase includes:

> "* * * the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities."

A 1973 Senate Foreign Relations Committee report explained:

> "The purpose of this provision is to prevent secret, unauthorized military support activities and to prevent a repetition of many of the most controversial and regrettable actions in Indochina. The ever deepening ground combat involvement of the United States in South Vietnam began with the assignment of U.S. 'advisers' to accompany South Vietnamese units on combat patrols; and in Laos, secretly and without Congressional authorization, U.S. 'advisers' were deeply engaged in the war in northern Laos." S. Rep. No. 220, 93d Cong., 1st Sess. 27 (1973).

Although the word "adviser" does not itself appear in section 8(c), the provision appears to be directed against the use of such personnel for commanding or coordinating foreign military actions, and to prevent military advisers from accompanying or participating with foreign troops in battle.

As interpreted by the State Department in 1978, this provision does not apply unless U.S. forces, who have been participating or accompanying foreign forces, actually encounter hostilities or face an imminent threat of becoming so engaged. Office of Legal Adviser, Department of State, Digest of United States Practice in International Law, (ed. Marian Lloyd Nash) at 1677 (1978).

Hostilities and imminent hostilities

"Hostilities" is defined in the House Foreign Affairs Committee report as broader in scope than "armed conflict":

> "The word hostilities was substituted for the phrase armed conflict during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, hostilities also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. 'Imminent hostilities' denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict." H.R. Rep. No. 93-287 at 7 (1973).

Therefore, "hostilities" includes not only situations where shots have been exchanged, but also confrontations posing a clear and present danger of battle.

"Imminent hostilities" is somewhat more remote, i.e., there must be "clear potential" for confrontation or conflict.

In 1975, at the request of Congressman Zablocki, the State Department provided its own working definitions of "hostilities" and "imminent hostilities":

> "As applied in the first three war powers reports, 'hostilities' was used to mean a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces, and 'imminent hostilities' was considered to mean a situation in which there is a serious risk from hostile fire to the safety of United States forces. In our view, neither term necessarily encompasses irregular or infrequent violence which may occur in a particular area." Hearings on War Powers Compliance Before the Subcommittee on International Security and Scientific Affairs, House International Relations Committee, 94th Cong., 1st Sess 38-39 (1975).

Equipped for combat

The House report does not attempt to define when troops are "equipped for combat." Rather, it indicates the committee's intent as to when a report is required after introducing "combat military forces" into a foreign country's airspace, territory, or waters. The provision

> "* * * covers the initial commitment of troops in situations in which there is no actual fighting but some risk, however small, of the forces being involved in hostilities. A report would be required any time combat military forces were sent to another nation to alter or preserve the existing political status quo or to make the U.S. presence felt. Thus, for example, the dispatch of Marines to Thailand in 1962 and the quarantine of Cuba in the same year would have required Presidential reports. Reports would not be required for routine port supply calls, emergency aid measures, normal training exercises, and other noncombat military activities." H.R. Rep. No. 93-287 at 7-8 (1973).

In 1978 hearings, Congressman Finley--one of the sponsors of the War Powers Resolution--volunteered his own interpretation of "equipped for combat":

> "The relevant question is not whether the U.S. forces are decked out in the full panoply of war with their sabers rattling, but whether they brought into the territory, airspace, or waters of a foreign nation the capacity to make war." Hearings on Congressional Oversight of War Powers Compliance: Zaire Airlift Before the Subcommittee on International Security and Scientific Affairs of the House International Relations Committee, 95th Cong., 2d Sess. at 4 (1978).

Substantially enlarging U.S. Armed Forces

The House report states that "substantially" indicates a flexible criterion. The report defines the word by example:

> "A 100-percent increase in numbers of Marine guards at an embassy--say from 5 to 10--clearly would not be an occasion for a report. A thousand additional men sent to Europe under present circumstances does not significantly enlarge the total U.S.

> troop strength of about 300,000 already there. However, the dispatch of 1,000 men to Guantanamo Bay, Cuba, which now has a complement of 4,000 would mean an increase of 25 percent, which is substantial. Under this circumstance, President Kennedy would have been required to report to Congress in 1962 when he raised the number of U.S. military advisers in Vietnam from 700 to 16,000." H.R. Rep. No. 93-287 at 8 (1973).

Ambiguity of the Resolution's terms

Congressional attempts to amplify on the meaning of key words of the Resolution as detailed above do not altogether resolve when a report is required to be filed under section 4 of the War Powers Resolution. The Harvard Journal on Legislation observed in 1974:

> "Although the War Powers Resolution embodies elements of both S. 440 and H.J. Res. 542, the end result is closer to the House version than to the Senate. The resulting compromise is not only ambiguous in its wording but also in its ultimate purpose."
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> "Many elements of the triggering list [under section 4(a)] are not defined by the War Powers Resolution or by either of the predecessor bills. Most notable are "hostilities" and "imminent" and "equipped for combat." Furthermore, policymakers and their lawyers will probably be able to construe other elements in a manner so as to make their meaning unclear." "The War Powers Resolution: Statutory Limitation on the Commander-in-Chief," 11 Harv. J. on Legis. 181, 187 and 192 (1974).

Thus, it should not be surprising that numerous interpretations of the War Powers Resolution exist, necessarily making determinations of Executive compliance difficult. See, e.g., Hearings on Congressional Oversight of War Powers Compliance: Zaire Airlift Before the Subcommittee on International Security and Scientific Affairs, House International Relations Committee, 95th Cong. 2d Sess. 6-33 (1978).

No consultation or reporting on El Salvador

We found no evidence that the President has, with regard to U.S. involvement in El Salvador, consulted with Congress pursuant to section 3 or submitted any report to Congress under section 4 of the War Powers Resolution. State and DOD officials have consistently maintained that no consultation or reporting has occurred because neither is required.

DOD legal memorandum on El Salvador

A legal memorandum dated February 12, 1981, prepared by DOD's Office of General Counsel, analyzed the applicability of the War Powers Resolution to the deployment of additional U.S. mobile training teams (MTTs) to El Salvador. The MTTs were to provide helicopter maintenance and pilot training. The memo concluded that no report to the Congress was necessary.

Specifically, DOD determined that a report under section 4(a)(1) of the War Powers Resolution, pertaining to the introduction of U.S. armed forces into hostilites or imminent hostilities, was not required based on the representation that the MTTs

--would be restricted to areas of El Salvador not expected to be the subject of military operations;

--would not function in a command and control capacity;

--would not deploy to hostile areas to advise;

--would not receive hostile fire pay; and

--would be engaged in routine training and maintenance program.

Section 4(a)(2) of the resolution (introduction of forces equipped for combat) was also found inapplicable, based on the representation that, although the teams would carry, or have access to, personal side arms suitable for individual protection,

--they would not carry or operate any other weapons; and

--their helicopters would not be specifically configured to carry weapons.

Lastly, the memo concluded that section 4(a)(3) did not apply (substantially enlarging U.S. forces) since the teams would add only 15 such military personnel to the 30 already assigned to El Salvador.

GAO analysis

Recognizing that DOD's Office of General Counsel concluded that the War Powers Resolution did not apply to the deployment of helicopter maintenance and pilot training MTTs to El Salvador in early 1981 based upon the representation of certain facts, we attempted to verify whether those facts as represented had actually existed. We found two areas of disagreement and a third that was problematic.

First, with regard to the representation that the MTTs would be restricted to areas of El Salvador not expected to be the subject of military operations, we found that the MTTs were working at Ilopango, the main air base of the Salvadoran Air Force. As such, one might expect the air base to be a potential target of the Salvadoran guerrillas and, in fact, it was. Nearly a year after the legal memorandum was written, in January 1982, the guerrillas scored a major hit on the air base, destroying or crippling nearly half of the helicopter fleet as well as several other aircraft. At the time, Americans performing helicopter maintenance and pilot training were deployed to the air base.

Second, with respect to the representation that the MTTs would not receive hostile fire pay, we found the opposite to be true. Of the 14 members of these teams, we were able to verify the personnel records of 13 for HFP payments. We found that of the 77 person months where members might qualify for HFP, in 75 person months or 97 percent of the time the personnel received HFP.

Third, it was represented that the helicopters would not be specifically configured to carry weapons at the time they were "introduced" into Salvadoran airspace. We found that all UH-1H helicopters provided to El Salvador have included M-60 machine guns and the M-23 armament subsystem (the machine gun doormount). For the trip to El Salvador, two M-60 machine guns were removed from their mounts on each helicopter and apparently shipped along with the helicopters aboard U.S. Air Force transports piloted by U.S. military personnel. The M-23 armament subsystems were left in place. When the helicopters entered Salvadoran airspace, they thus were "unarmed." Once in the country, the M-60s were mounted by a U.S. Army quality assurance team as part of their standard assembly and inspection process prior to transferring an item to the foreign user. We were told that, although the M-23 subsystems were in place when the helicopters entered El Salvador, DOD did not consider them to be "specifically configured to carry weapons" despite the fact that the M-23 subsystem is only suitable for the UH-1D and UH-1H series of Army helicopters and the M-23 is designed for the specific purpose of carrying the M-60 machine guns.

As discussed earlier, section 4(a)(2) of the War Powers Resolution requires a report to Congress whenever U.S. troops equipped for combat enter a foreign nation, except for solely

routine training and supply deployments. The House Foreign Affairs Committee interpreted this to mean that a report is required whenever "combat military forces" are sent in "to alter or preserve the existing political status quo or to make the U.S. presence felt." In contrast to the Committee's focus on intent, DOD has looked to the weaponry, concentrating on whether the troops are carrying or operating weapons other than "personal side arms" or whether their aircraft or vehicles are specifically configured to carry weapons.

Looking to the weaponry (DOD's interpretation of section 4(a)(2)), we question DOD's determination that the helicopters shipped to El Salvador with guns removed but with gunmounts intact were not "specifically configured to carry weapons" in that the M-23 system gunmounts can only be used with the UH-1D and UH-1H series of Army helicopters. Under DOD's interpretation of section 4(a)(2) of the resolution, a report would be required if an aircraft specifically configured to carry weapons were introduced into a country's airspace. However, the resolution as written does not hinge reporting upon an aircraft's configuration but upon whether, when it entered El Salvadoran airspace, it was "equipped for combat." The helicopters did not fly by themselves into El Salvador but were carried aboard unarmed U.S. Air Force transports. If that transport had been hit or threatened with imminent hostilities, it could not itself have been used in battle, nor could the helicopters have been used until the transport had landed, the helicopters unloaded, the guns remounted, and the aircraft checked out. As such, the helicopters were not equipped for immediate combat at the time they entered El Salvadoran airspace. This may remove it from the reporting requirements under section 4(a)(2) of the resolution. A different result probably would have been obtained if armed helicopters had themselves been flown into El Salvador.

The facts we developed contradict some of the representations made to DOD's Office of General Counsel, representations which apparently were regarded as supporting DOD's conclusion that a report under section 4(a)(1) was not required. In any future deployments of MTTs to El Salvador, DOD should closely consider the applicability of section 4(a)(1) of the War Powers Resolution, and monitor subsequent events to ascertain that the facts as represented actually exist.

Lempa River incident

On June 23, 1982, CBS Evening News reported that, according to Salvadoran soldiers, 10 Americans based at the Lempa River camp (about 45 miles southeast of San Salvador) were taking part in combat operations, "fighting side by side" with government troops. CBS reported that they not only were present during hostilities but were carrying M-16 rifles and had fired 81mm mortars against a rebel base a mile or two from the camp. The CBS news crew filmed two Americans at the site wearing combat fatigues.

CBS also reported that rebel forces on June 23 attacked a bus only a mile from where the Americans were spotted, and that this was an area of persistent fighting between government troops and guerrillas who have been attempting to destroy the bridge over the river, thus cutting off the eastern third of El Salvador.

The State Department's Legal Adviser stated in congressional hearings in 1978 that section 8(c) of the War Powers Resolution makes clear that the resolution applies to members of U.S. armed forces participating with or accompanying foreign military forces when these foreign forces are engaged in or exposed to hostilities.

DOD officials vigorously denied the CBS report. According to them, the unit the CBS crew filmed was a 6-man team from the 25-man MTT that had been deployed to El Salvador to train a third Salvadoran quick reaction battalion. The team was providing a variety of small arms training as part of an overall bridge protection training program. Included in this training was the operation of M-16 rifles, M-79 grenade launchers, and 81mm mortars. DOD officials stated that the CBS crew may have seen the trainers carrying M-16 rifles as they were instructing the Salvadorans in their use. Further, DOD denied that the 81mm mortar was being operated against guerrilla targets. The team only fired the mortar within the training area and into an open field to demonstrate its use.

The Salvadorans being trained were army troops assigned to guard the bridge across the Lempa River. Training had to take place at the bridge because there were unique requirements of training that could not have been duplicated elsewhere. DOD emphatically denied the CBS report that the area is one of persistent fighting between the two sides, insisted that the area is safe for training and that there had been no hostile action against the bridge or its defenders for at least 90 days. However, the trainers returned to San Salvador each evening since the area was not considered safe at night. Transportation to and from the training sites was generally made via UH-1H helicopters.

We did not determine whether the CBS version or the DOD version of the story is accurate. DOD guidelines prohibit U.S. military personnel in El Salvador from carrying M-16 rifles 1/ and from wearing camouflage jungle fatigues. What is agreed to is that U.S. trainers were at the Lempa River camp and surrounding training sites and that the U.S. trainers fired an 81mm mortar. It is also undisputed that the Lempa River camp is near a strategic bridge whose destruction along with another bridge about twenty miles to the north would effectively isolate the eastern third of the country.

1/It should be noted that in February 1982, Cable TV filmed three members of an MTT carrying M-16s in a recently secured area that the U.S. Ambassador described as reasonably safe. The commanding officer of the MTT was removed and returned to the U.S. and the other members were repremanded for violating the personal side arms guidance. At the time of this incident, all three members had received HFP for their prior 6 months in El Salvador.

Whether or not there had been hostilities in the area for the previous 90-day period, it appears that the Lempa River bridge would be a likely target for guerrilla attack. They destroyed the accompanying road bridge (a part of the Pan American Highway) on October 15, 1981. Road traffic across the river is now handled via a paved over section of the rail bridge.

The theme that underlies much of the legislative history of the War Powers Resolution is "No More Vietnams," a war which began with the assignment of U.S. military advisers to accompany South Vietnamese units on combat patrols and secret missions. If the CBS report is accurate, the involvement by U.S. forces in actual combat probably would trigger the consultation and reporting requirements of sections 3 and 4(a)(1) of the War Powers Resolution relating to the introduction of U.S. forces into hostilities, and section 4(a)(2) of the Resolution, pertaining to the introduction of U.S. forces equipped for combat. However, without further information, we cannot say that this is the case.


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